(4)

SEP 8 - 2004

No. 03-1652

In The
Supreme Court of the United States

JOHN DOE I, JANE DOE, and JOHN DOE II,

Petitioners,

v.

BILL TANDESKE, Commissioner of the State of Alaska Department of Public Safety and GREGG RENKES, Attorney General of the State of Alaska,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' OPTIONAL REPLY BRIEF SUPREME COURT RULE 15(6)

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QUESTION PRESENTED

Alaska's sex offender registration act, Alaska Stat. § 12.63.010 *et seq.*, requires persons long ago convicted, released and reintegrated to register with the authorities for life and to have personal and private information disseminated to the public. The private information disseminated to the public is not limited to private information belonging to the registrant, but included information belonging to members of the registrant's family. Does the Act, as applied to petitioners, violate the substantive component of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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REPLY BRIEF FOR PETITIONERS

There are no misstatements in petitioners' statement of the case.

Respondents erroneously contend petitioners made numerous misstatements in the petition, which they are compelled to correct. [Opp. 7-11].

Petitioners have not mischaracterized the Alaska legislature's motive, or erroneously asserted that the ASORA labels the registrant. [Opp. 7-8]. *See Doe v. State, Department of Public Safety*, 92 P.3d 398, 407-411 (Alaska 2004).

Respondents are wrong to contend that petitioners cite certain statutory provisions for the first time. *Id.* Those same statutory provisions, with the exception of *Ak. Stat. 44.41.035(b)(5)* [Pet. App. 21a] were cited to this Court in *Smith v. Doe*, 538 U.S. 84 (2003). [*Brief of Respondents*, p. 5, fn. 3, Docket No. 01-179]. Section 44.41.035(b)(5) was cited for the first time before the Court of Appeals on remand because it was added as a consequence of the ASORA after this Court's decision in *Smith v. Doe*. [Pet. App. 26a, *citing § 13, ch. 88, SLA 2003*].

The ASORA does in fact require petitioners to gather, collate and deliver information to the State, and it does require release of mental health information. [Opp. 9-10]. *Doe v. State, Department of Public Safety*, 92 P.3d at 408-411. Indeed, *Ak. Stat. 12.63.010(b)(1)(H)* requires release of mental health information and respondents have exceedingly broad discretion in deciding how to verify information, which would include compelling production of those mental health records. [Pet. App. 9a-9b]; *Ak. Stat. 18.65.087(f)*; [Pet. App. 20a]. It just would not make sense to require mental health information and then not allow

the State to follow up and request more information should mental abnormalities be reported by a registrant.

The only misstatements before this Court are those of respondents regarding the importance and the effect of the intervening decision by the Alaska Supreme Court in *Doe v. State, Department of Public Safety*, 92 P.3d 398 (Alaska 2004). Petitioners correctly show that *Doe v. State, Department of Public Safety* has so changed the legal landscape that an injustice would result if the Court of Appeals decision were allowed to stand without allowing reconsideration based on this intervening change in the law. In light of this intervening decision, there is a conflict between the Alaska Supreme Court's interpretation of State law and this Court's interpretation. Under Rule 10(a) of this Court's Rules, that is grounds for granting a petition for writ of certiorari. In light of this conflict, a GVR Order is the appropriate remedy, which would allow the Court of Appeals to reconsider its decision in light of the intervening change in the law. Alternatively, grant of the petition and ordering a briefing schedule is minimally required so the degree to which the Alaska Supreme Court's decision changes the legal landscape can be adequately briefed and addressed by this Court. Respondents attempt to minimize this conflict by grossly understating the importance of the Alaska Supreme Court's decision, and by relying on an Alaska Court of Appeals decision that has been overruled. [Opp. 23]; *Doe v. State, Department of Public Safety*, 92 P.3d at 411. Their position in this regard, while artfully crafted, lacks any appreciable merit.

The intervening decision warrants a GVR Order or grant of the petition.

On remand from this Court, petitioners reargued their as applied challenge, contending the ASORA violated both the procedural and substantive component of the Due Process Clause of the 14th Amendment. [Pet. App. 1a-4a]. In deciding against petitioners, the Court of Appeals for the Ninth Circuit did not have an opportunity to consider the effect or importance of the Alaska Supreme Court's decision in *Doe v. State, Department of Public Safety*, 92 P.3d 398 (Alaska 2004), where the Alaska Supreme Court held that, as applied to persons whose conviction had been set aside, or who had demonstrated excellent prospects for rehabilitation and who were not a risk to the public, the ASORA violated due process. *Id.* [Pet. App. 1a-4a].

In reaching its conclusions, the Alaska Supreme Court held, in part, that there was no legitimate reason to support the belief that Doe posed a public danger and thus, the State's interference with his liberty interests was unjustified. *Doe v. State, Department of Public Safety*, 92 P.3d at 412. The Court further held that "absent the likelihood Doe will commit new sex offenses, there is no compelling government interest in requiring Doe to do the things ASORA demands." *Id.* The holding in *Doe v. State, Department of Public Safety*, is premised on the fact that the set aside order demonstrates the recipient is rehabilitated and no longer dangerous and thus there is no compelling need to require that particular individual to register. *Id.* The finding of "no compelling need" clearly demonstrates that the Alaska Supreme Court found that certain fundamental rights (e.g., the right to be let alone) were abrogated by the registration requirement, and thus, the Court of Appeals for the Ninth Circuit applied the

wrong standard to determine whether the ASORA violated the Does' due process rights. *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004). Rather than apply strict scrutiny, the Court of Appeals applied the reasonable relationship test. *Id.* The Alaska Supreme Court's decision requires a finding, at a minimum, that important state granted fundamental rights are abrogated and these liberty interests are protected by 14th Amendment Due Process. *Hewitt v. Helms*, 459 U.S. 460, 466, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983); *Olim v. Wakinekona*, 461 U.S. 238, 249, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983).

In the instant case, John Doe I demonstrated that he does not pose a public danger and there is no evidence that John Doe II presently poses a threat to public safety. *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001). John Doe I had two separate, judicial determinations regarding his prospect for rehabilitation and the lack of threat to public safety. The first was when the sentencing court modified his sentence due to his excellent prospect for rehabilitation, and the second was when the Alaska Superior Court granted his request for custody of his daughter. *See Doe v. Otte*, 259 F.3d at 982. Moreover, the record will reflect that the State Board of Parole released John Doe I early, citing his rehabilitation and low threat to public safety. The question then is whether the ASORA, as applied, to John Doe I or John Doe II violates their due process rights. Although the Court of Appeals decided that question in the negative, it did so based on this Court's interpretation of a State law, and not based on the Alaska Supreme Court's interpretation of that same law. [Pet. App. 4a].

In deciding the ASORA did not violate the Does' due process rights, the Court of Appeals applied this Court's

interpretation of the ASORA as set out in *Smith v. Doe*, 538 U.S. 84 (2003). [Pet. App. 4a]. That interpretation has now proved to be erroneous, because the ill effects of the law do not flow from the conviction; rather they flow from the Act itself. *Doe v. State, Department of Public Safety*, 92 P.3d at 408-411. As set out in petitioners' supplemental brief to this Court, the Alaska Supreme Court's interpretation of State law differs significantly from this Court's interpretation, and both this Court and the Court of Appeals are now bound by the Alaska Supreme Court's interpretation, even if it is contrary to this Court's interpretation as expressed in *Smith v. Doe*. *See Moore v. Illinois C. R. Co.*, 312 U.S. 630, 633-34 (1941). Notwithstanding respondents' well crafted legal argument [Opp. 11-24], the respondents overlook some indisputable truths.

First, the Alaska Supreme Court's interpretation of the ASORA differed substantially from the interpretation applied by this Court in *Smith v. Doe*, 538 U.S. 84 (2003), and applied by the Court of Appeals for the Ninth Circuit when it held that it was bound by *Smith v. Doe*. *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004). This differing interpretation creates the type of conflict required for granting a writ of certiorari under this Court's Rule 10(a).

Second, the Court of Appeals for the Ninth Circuit is now bound by the Alaska Supreme Court's interpretation of the ASORA, and not by this Court's interpretation in *Smith v. Doe*.

Third, the Court of Appeals held that the ASORA did not infringe on fundamental liberties, and thus strict scrutiny did not apply; rather the respondents only needed to show a reasonable relationship to a legitimate governmental interest.

Fourth, the Alaska Supreme Court held the ASORA does infringe on fundamental liberties and strict scrutiny did apply – the government must show a compelling need and that the means employed must be the least restrictive means available to achieve the government's goal. One fundamental liberty infringed was the right to be let alone, which, in Alaska, is the same as the federal right to be let alone. *See Breeze v. Smith*, 501 P.2d 159, 168 (Alaska 1972); *Doe v. State, Department of Public Safety*, 92 P.3d at 408.

Fifth, the authority relied upon by the respondents is not controlling. [Opp. 23, *citing Patterson v. State*, 985 P.2d 1007 (Alaska 1999)]. Contrary to respondents' misstatement, *Patterson* was overruled by the Alaska Supreme Court in *Doe v. State, Department of Public Safety*, 92 P.3d at 411. Respondents' argument to the contrary, other State's have held that sex offender registration requirements violate due process. *See State v. Guidry*, ___ P.3d ___, 2004 Haw. LEXIS 540 (Hawaii, August 6, 2004).

Justice requires that the Court of Appeals must be given the opportunity to reconsider its decision in light of the intervening decision by the Alaska Supreme Court. The meaning of the Alaska Supreme Court's decision and its effect on the petitioners' case should be decided there in the first instance[1], so the issues are well briefed and

[1] Allowing the Court of Appeals to interpret the meaning and effect of the Alaska Supreme Court's decision in *Doe v. State, Department of Public Safety* makes sense because the numerous questions that arise in light of the conflict between the Alaska Supreme Court's interpretation of the ASORA and this Court's interpretation can best be resolved before the Court of Appeals in the first instance. As an example, if there is a need for clarification, the Court of Appeals can certify questions to the Alaska Supreme Court under Alaska Appellate Rule 407.

"fleshed out" before this Court is faced with those questions. That being so, this Court should issue a GVR (Grant Vacate & Remand) Order, so the Ninth Circuit can reconsider its decision in light of the Alaska Supreme Court's interpretation of the ASORA.

CONCLUSION

The petition for writ of certiorari should be granted, the Court of Appeals decision should be vacated, and this case should be remanded for reconsideration in light of the Alaska Supreme Court's decision in *Doe v. State, Department of Public Safety.* Alternatively, the petition should be granted and a briefing schedule should issue.

Respectfully submitted:

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